United States Court of Appeals

for the Second Circuit

APPELLANT'S SUPPLEMENTAL BRIEF

74-2079

To Be Argued By
Andrew C. Hartzell, Jr.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-2079

M. SPIEGEL & SONS OIL CORP.,

Plaintiff-Appellee,

-against-

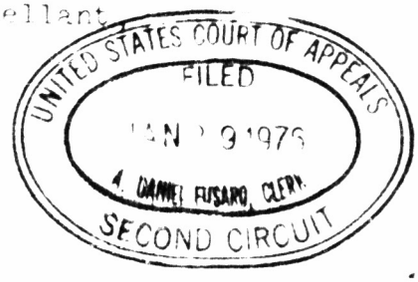
B. P. OIL CORP.,

Defendant-Appellant,

and

STANDARD OIL COMPANY (SOHIO),

Defendant.



On Appeal from the United States District Court for the Eastern District of New York

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SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT

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SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT

PRELIMINARY STATEMENT

BP submits this supplemental brief in accordance with the Court's order of January 15, 1976. The order also requires Spiegel to file a supplemental brief

by February 12, 1976. We understand that supplemental briefs have been required because the last briefs on this appeal were filed over a year ago, and there have been developments pertinent to the issues since that time.

I.

Developments With Respect to the Federal Energy Statutes and Regulations

The basic regulatory framework established pursuant to the Emergency Petroleum Allocation Act of 1973, P.L. 93-159, 15 U.S.C. §§ 751 et seq. ("EPAA"), has remained relatively intact since the filing of the last briefs. The EPAA expired on August 31, 1975, but was extended until November 15, 1975 by P.L. 94-99, effective September 29, 1975. Section 3 of P.L. 94-99 expressed the Congressional intent "that the regulations promulgated under [EPAA] shall be effective for the period between August 31, 1975, and the date of enactment of this Act." Despite some question as to the constitutionality of retroactive application of criminal penalties set forth in the regulations, the Federal Energy Administration ("FEA"), in Ruling 1975-17, CCH Energy Management ¶ 16,057, 40 Fed. Reg. 48341 (October 15, 1975), indicated that it expected the reinstitution of any supplier/purchaser

relationships terminated during the hiatus period of August 31-September 29, 1975, and the rollback of any prices established in excess of controlled levels during that period.

The EPAA was again extended, this time for thirty days until December 15, 1975, by P.L. 94-133, effective November 14, 1975. On December 22, 1975, President Ford signed the Energy Policy and Conservation Act, P.L. 94-163 ("EPCA"), which, among other things, extended and partially amended the EPAA. Section 463 of Title IV of the EPCA made the amendments to the EPAA retroactive to December 15, 1975, except where otherwise provided. In addition, § 454 added a new § 11 to the EPAA, providing for executive reevaluation of the mandatory allocation and price controls program set forth in § 4(a) of the EPAA, and for the promulgation of amendments to the regulations as, inter alia, will eliminate those provisions no longer considered necessary. In this regard, President Ford declared in signing EPCA that, pursuant thereto, FEA would begin immediately to remove all price and allocation regulations other than those on crude oil prices, which will be phased out over a 40-month period. Weekly Compilation of Presidential Documents, vol. 11, no. 52 at 1392 (December 29, 1975). While gasoline allocation requirements as to Spiegel may soon be removed, there has been no material change in these requirements to date.

The FEA indicated by Notice dated January 5, 1976 that "[u]ntil such time as such modifications [in the regulations] are issued in final form, the regulations in existence on December 15, 1975 remain in full force and effect." CCH Energy Management ¶ 17,347 at 17,400.

II.

Developments With Respect to the Jurisdictional Issue

BP's earlier briefs show that this Court has jurisdiction of this appeal notwithstanding Spiegel's contention that exclusive jurisdiction is with the Temporary Emergency Court of Appeals ("TECA"). Since the earlier briefs on this issue, TECA has decided two cases which demonstrate that it lacks jurisdiction of such an appeal. If this appeal cannot be heard in the Second Circuit, therefore, we will have the odd result that the District Court's decision in this case--unlike preliminary injunction decisions in other cases--cannot be appealed anywhere until after trial of all the issues in the 17-count complaint. This is a particularly undesirable result where, as here, the interlocutory appeal involves issues relating to transfer, stay, and the general standards for granting a preliminary injunction in this Circuit--matters which are

peculiarly appropriate for this Court to review--and where there is only one alternative issue concerning the federal energy regulations. And as to the latter point, the discussion hereafter at pp. 11-15 demonstrates that Spiegel's assertion that the federal energy regulations prevent BP from collecting its mortgage debt is completely erroneous.

The two jurisdictional cases discussed below refer in some detail to § 211 of the Economic Stabilization Act of 1970. Attached as Exhibit A is a copy of this section, which appears in the Supplement to 12 U.S.C.A. § 1904. Section 5(a) of the EPAA, 15 U.S.C.A. § 754(a), incorporates this section by reference. It defines TECA's jurisdiction to hear appeals in cases arising under the EPAA or the regulations thereunder ("EEA Regulations").

Section 211(b)(2) provides in part:

> "(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. . . ." (Emphasis added.)

Section 211(d)(2) provides:

> "(2) A district court of the United States or the Temporary Emergency Court of Appeals may

enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it. Appeals from interlocutory decisions by a district court of the United States under this paragraph may be taken in accordance with the provisions of section 1292(b) of title 28, United States Code [section 1292(b) of Title 28]; except that reference in such section to the courts of appeals shall be deemed to refer to the Temporary Emergency Court of Appeals." (Emphasis added.)

In Exxon v. Federal Energy Administration, 516 F.2d 1397 (TECA 1975), rehearings and rehearings en banc denied, TECA held that it had no jurisdiction under § 211(d)(2) to hear an appeal from a district court order denying a preliminary injunction against the FEA. The court concluded that the general statute for appeal of preliminary injunctions, 28 U.S.C.A. § 1292(a), was inapplicable to it, and that Congress had given it jurisdiction to review preliminary injunction decisions only when certified under § 1292(b). A copy of the Exxon decision is attached as Exhibit B.

TECA in Spinetti v. Atlantic Richfield Company (Arco), 522 F.2d 1401 (TECA 1975), a copy of which is attached as Exhibit C, applied the same rule to a case involving private parties. Plaintiffs were Arco distributors

who sued to prevent Arco from terminating their distributorship agreements. They claimed that such terminations violated the antitrust laws, the Fair Trade laws of California, contract rights, and various sections of the FEA Regulations. The District Court denied their motions for preliminary injunctions and the plaintiffs appealed to TECA. TECA held, as it had in Exxon, that Congress had not given it jurisdiction to hear an appeal under § 1292(a).

TECA also emphasized in Spinetti that, as a court of special jurisdiction, it should construe its statutory grant of jurisdiction narrowly, and that it therefore had no jurisdiction over appeals relating to the antitrust, Fair Trade, and contract claims set forth in the complaint. Matters relating to those claims it considered to be appealable only to the Ninth Circuit.

Significantly, neither the Exxon nor Spinetti case holds that 28 U.S.C.A. § 1292(a) is unavailable to a party aggrieved by a preliminary injunction if it desires to appeal to one of the circuit courts rather than to TECA.* Nor does the statute, literally read as those cases require that it be read, specifically take away from a party the right it otherwise has to appeal

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* In fact, in Gulf Oil Corp. v. Federal Energy Administration, 521 F.2d 810 (TECA 1975), the only other TECA decision subsequent to Exxon dealing with the appealability issue, the court, citing Exxon, stated that, "this court has held that section 211(d)(2) of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904, which defines our appellate jurisdiction, does not permit an (con't)

to a circuit court under § 1292(a). The statute provides in § 211(b)(2) that "[e]xcept as otherwise provided in this section," TECA has exclusive jurisdiction of all appeals. TECA has construed § 211(d)(2) as the "exception" referred to, and has interpreted that exception as limiting its exclusive jurisdiction of interlocutory appeals to those certified under § 1292(b), regardless of whether the case involves the FEA or private parties, and regardless of whether the issue is the validity of an FEA Regulation or simply its applicability to a particular situation. This leaves literally untouched a party's right to appeal to a circuit court under § 1292(a).

There are several reasons why that right should be recognized here as to the issue whether the FEA Regulations extend to BP's collection of the mortgage debt. First, that issue does not involve the validity of the FEA Regulations, but simply whether they apply to BP's collection of the debt. As to that type of question, the legislative history of § 211 indicates that Congress did not mean in all circumstances to give TECA exclusive appellate jurisdiction. Thus § 211(a) provides in part that "any court of competent jurisdiction" may "consider, hear, and determine any issue by way of defense (other

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(Footnote con't from p. 7)
appeal of right to this court from an order granting or denying a preliminary injunction." (Emphasis added.)

than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court." The Senate Committee Report accompanying the Economic Stabilization Act Amendments of 1971 explained that, in such a case originating in a state court, "the issue of the applicability could be decided in [the state] court, and appeals would proceed through the procedure established for that court." U.S. Code Cong. & Admin. News, 1971, at 2292. Here the issue of the applicability of the regulations has arisen in the District Court rather than in a state court, but the same reasoning permits this Court to review the issue on appeal. If BP had sued in the state court to collect the mortgage indebtedness, and Spiegel had claimed the FEA Regulations barred such collection, we would have a case like that referred to in § 211(a) and in the Senate Committee Report. The situation is not in substance different just because Spiegel raced to the District Court and, anticipating its defense to a BP action to collect the mortgage debt, urged that the FEA Regulations prevented such collection.

Moreover, in its verified complaint, Spiegel

seeks, inter alia, an order, pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 et seq., declaring that the mortgage notes may not be "accelerated", and that they are null and void. Verified Complaint (A 4 and 35). Such a claim, which simply anticipates a defense to BP's mortgage foreclosure actions based on state law, cannot be considered to "arise under" the EPAA. See Skelly Oil Co. v. Phillips Petroleum Company, 339 U.S. 667, 672 (1950). For this reason as well, § 211 does not bar this Court's jurisdiction on this issue.

Second, this Court in any event has jurisdiction of the other issues on appeal because the District Court's denial of a stay amounted to the denial of an injunction (see BP's reply brief pp. 5 et seq.). Since TECA has now made it clear that it declines jurisdiction of non-FEA issues so that a split appeal would be called for as to the stay and transfer issues, there can be no suggestion that speed in ultimate resolution is accomplished by barring an appeal as of right to TECA. Finally, any purported goal of achieving consistency of interpretation of FEA matters by giving TECA exclusive jurisdiction of appeals in such matters is completely undermined by permitting district courts to determine such issues on their own without review at all; inconsistency is likely to be reduced, even if consistency is not assured,

if preliminary rulings are reviewed in Courts of Appeals.

III.

Developments With Respect to FEA Coverage of Mortgage Indebtedness

BP's prior briefs point out that the FEA Regulations do not extend to the question of BP's right to collect the mortgage debt. Recent decisions add further support for that position.

In Shell Oil Company v. Federal Energy Administration, CCH Energy Management ¶ 26,033 (TECA 1975), TECA affirmed a final judgment of the District Court enjoining the FEA from enforcing §§ 212.101-103 of the FEA Regulations. These sections controlled the amount which a lessor could charge as rent for gasoline stations. TECA held that the FEA had authority only to allocate gasoline, and not to regulate real property rents. If the FEA believed that a lessor who was also a gasoline supplier had raised its rents as a means of obtaining an unlawfully higher price for gasoline, the FEA could require the lessor to substantiate

the increased rentals. However, the court held that there was not an inherent relationship between lease rentals and gasoline prices sufficient to justify the challenged sections of the regulations.*

As a result of the Shell decision the FEA, on December 31, 1975, revoked its rent regulations. See 40 Fed. Reg. 60036 (December 31, 1975).

In a similar vein are four district court decisions holding that termination of gas station leases, or dealer or distributor agreements, are outside the coverage of the FEA Regulations. Russell v. Shell Oil Co., 382 F. Supp. 395 (E.D. Mich. 1974), aff'd without opinion, 497 F.2d 924 (6th Cir. 1974); Guyer v. Cities Service Co., 381 F. Supp. 7 (E.D. Wisc. 1974); Burk v. Gulf Oil Corp., 397 F. Supp. 421 (D. Mont. 1975); and AJFC, Inc. v. Amoco Oil Co., _____ F. Supp. _____, CCH Trade Reg. Rept. ¶ 60,628 (N.D. Ohio 1975). In substance, these cases hold that the EPAA and FEA Regulations do not protect so-called "independent" marketers from termination of their leases or other contractual

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* The court also ruled that the regulations in question were invalid because they were adopted in violation of the Administrative Procedure Act.

arrangements. The Act and the FEA Regulations are concerned with allocation of gasoline supplies at appropriate prices for the allocated product, and as long as that is done, leases and other agreements may be enforced or terminated in accordance with normal contract rights.

As stated in Guyer v. Cities Service Co., supra,

> "Thus, as long as a gasoline supply is available to the supplier's base period purchasers, lease cancellations are irrelevant. Since here, Citgo has offered to continue to supply plaintiffs with their gasoline allocations, it appears to be complying with this FEA regulation. A distinction must be drawn between Citgo's supplying of the allocated product, which is required by the regulations, and its leasing of the stations and equipment, which is not.
>
> "Further support for the conclusion that the regulations do not apply to termination of leases is found in Russell v. Shell Oil Co., 382 F. Supp. 395 (E.D. Mich. 1974). In footnote six, the Court quoted from an FEO letter that, 'the agency does not attempt to interfere nor interpret the rights and remedies under dealer agreements and leases.'" 381 F. Supp. at 13.*

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* See also Guyer's discussion, 381 F. Supp. at 10-11, of the House Committee Report quoted by the District Court in the present case on the subject of preserving "independent" marketers. (A 375-76) Guyer shows the error in the assumption of the District Court that the law as finally enacted attempted to regulate the distribution structure of the industry.

Similarly, in Burk v. Gulf Oil Corporation, supra, the court quoted from an FEA ruling in Elwood J. Rokenbrodt, CCH Energy Management ¶ 83,066 (decided March 12, 1975);

> "'As we held in [Greenbelt Consumers Services, Inc., CCH Energy Management ¶ 20,211 (decided December 17, 1974)], the FEA Regulations do not prohibit a firm from exercising private contractual remedies available to it which result in termination of franchise agreements under which a firm previously occupied the status of a branded dealer.'" 397 F. Supp. at 425.*

Spiegel's arguments, more or less accepted by the District Court (A 375-76), were that collection of the mortgage debt would amount to a change in "normal business practice", or "more stringent credit terms and payment schedules", in violation of § 210.62(a) of the FEA Regulations, or an increase in BP's price of gasoline in violation of § 212.82(a) of the FEA Regulations. (Spiegel's brief, December 3, 1974 at pp. 20 et seq.) The District Court, referring specifically only to credit terms, stated that the question was one for "debate" and that there was "at least a substantial possibility for ultimate success by the plaintiff on this point" (A 376). It is, however, undisputed that, as BP reminded Spiegel in 1971, the mortgage debt by its own terms originally became due June 30,

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* The FEA directive to BP on the gallonage to be supplied Spiegel also included the following statement: "Finally, please note that this directive is subject to Spiegel compliance with its contractual obligations to BP and such court orders as may apply." (A 159)

1973, long before the federal energy legislation. The amount of the debt was and is unrelated to either the quantity or the price of the gasoline BP sells and is continuing to sell to Spiegel. The debt simply depends on the amount Spiegel owes on the properties involved. The debt is much farther removed from gallonage or price of gasoline than are gasoline station rents based on gallonage, or station lease termination issues, which the above-cited cases recognize as outside the scope of the FEA Regulations. There is no basis, therefore, for the contention that BP's collection of the debt is barred by the EPAA or the FEA Regulations. The District Court was plainly in error in concluding that Spiegel had made a sufficient showing to warrant a preliminary injunction.

IV.

Developments With Respect to the Mortgaged Properties

In July 1974, there were some 21 mortgages on 26 properties, with about $791,000 owed (A 357). Although not in the record, we believe it is undisputed that on November 1, 1975, there were 15 mortages on 21 properties, with about $471,000 owed. These changes, principally as a result of monthly payments, underscore the fact that the

mortgages are unrelated to the quantity or price of gasoline BP sells to Spiegel. Furthermore, the number of mortgaged properties is small compared to the 135 or more stations to which Spiegel distributes its gasoline (A 276).

In view of the reduction in the amount of the mortgage debt, and the sharp decline in interest rates, which is a matter of common knowledge, it is even clearer now than at the time of the preliminary injunction hearing that Spiegel would not be irreparably harmed if it had to borrow the amount necessary to pay off the mortgages. This point was discussed at pages 25-26 of BP's brief dated October 18, 1974, where we also pointed out that the District Court misunderstood the arithmetic of the situation in finding that Spiegel was threatened with irreparable harm.

Conclusion

For the reasons stated above and in BP's prior briefs, we respectfully request that the injunction below be vacated and the District Court be ordered to stay the

action and transfer it to New Jersey.

Dated: New York, New York
January 29, 1976

Respectfully submitted,

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[¶ 10,662]

§ 210. Suits for damages or other relief

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

(2) not less than $100 or more than $1,000; except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: Provided, That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

(c) For the purposes of this section, the term "overcharge" means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title.

.01 P. L. 92-210, December 22, 1971.

[¶ 10,663]

§ 211. Judicial review

(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this

EXHIBIT A

title or the validity of agency action under this title, the cases shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code.

(b)(1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Temporary Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Except as provided in subsection (d)(2) of this section, the court shall not have power to issue any interlocutory decree staying or restraining in whole or in part any provision of this title, or the effectiveness of any regulation or order issued thereunder. In all other respects, the court shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases over which it has jurisdiction under this title. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

(c) In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition.

(d)(1) Subject to paragraph (2), no regulation of any agency exercising authority under this title shall be enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was arbitrary

or capricious, or was otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, and no order of such agency shall be enjoined or set aside, in whole or in part unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

(2) A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it. Appeals from interlocutory decisions by a district court of the United States under this paragraph may be taken in accordance with the provisions of section 1292(b) of title 28, United States Code; except that reference in such section to the courts of appeals shall be deemed to refer to the Temporary Emergency Court of Appeals.

(e)(1) Except as provided in subsection (d) of this section, no interlocutory or permanent injunction restraining the enforcement, operation, or execution of this title, or any regulation or order issued thereunder, shall be granted by any district court of the United States or judge thereof. Any such court shall have jurisdiction to declare (A) that a regulation of an agency exercising authority under this title is in excess of the agency's authority, is arbitrary or capricious, or is otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, or (B) that an order of such agency is invalid upon a determination that the order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

(2) Any party aggrieved by a declaration of a district court of the United States respecting the validity of any regulation or order issued under this title may, within thirty days after the entry of such declaration, file a notice of appeal therefrom in the Temporary Emergency Court of Appeals. In addition, any party believing himself entitled by reason of such declaration to a permanent injunction restraining the enforcement, operation, or execution of such regulation or order may file, within the same thirty-day period, a motion in the Temporary Emergency Court of Appeals requesting such injunctive relief. Following consideration of such appeal or motion, the Temporary Emergency Court of Appeals shall enter a final judgment affirming, reversing, or modifying the determination of the district court and granting such permanent injunctive relief, if any, as it deems appropriate.

(f) The effectiveness of a final judgment of the Temporary Emergency Court of Appeals enjoining or setting aside in whole or in part any provision of this title, or any regulation or order issued thereunder, shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed

or capricious, or was otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, and no order of such agency shall be enjoined or set aside, in whole or in part unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

(2) A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it. Appeals from interlocutory decisions by a district court of the United States under this paragraph may be taken in accordance with the provisions of section 1292(b) of title 28, United States Code; except that reference in such section to the courts of appeals shall be deemed to refer to the Temporary Emergency Court of Appeals.

(e)(1) Except as provided in subsection (d) of this section, no interlocutory or permanent injunction restraining the enforcement, operation, or execution of this title, or any regulation or order issued thereunder, shall be granted by any district court of the United States or judge thereof. Any such court shall have jurisdiction to declare (A) that a regulation of an agency exercising authority under this title is in excess of the agency's authority, is arbitrary or capricious, or is otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, or (B) that an order of such agency is invalid upon a determination that the order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

(2) Any party aggrieved by a declaration of a district court of the United States respecting the validity of any regulation or order issued under this title may, within thirty days after the entry of such declaration, file a notice of appeal therefrom in the Temporary Emergency Court of Appeals. In addition, any party believing himself entitled by reason of such declaration to a permanent injunction restraining the enforcement, operation, or execution of such regulation or order may file, within the same thirty-day period, a motion in the Temporary Emergency Court of Appeals requesting such injunctive relief. Following consideration of such appeal or motion, the Temporary Emergency Court of Appeals shall enter a final judgment affirming, reversing, or modifying the determination of the district court and granting such permanent injunctive relief, if any, as it deems appropriate.

(f) The effectiveness of a final judgment of the Temporary Emergency Court of Appeals enjoining or setting aside in whole or in part any provision of this title, or any regulation or order issued thereunder, shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed

with the Supreme Court under subsection (g) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the action by the Supreme Court.

(g) Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code. The Temporary Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Temporary Emergency Court of Appeals, shall have exclusive jurisdiction to determine the constitutional validity of any provision of this title or of any regulation or order issued under this title. Except as provided in this section, no court, Federal or State, shall have jurisdiction or power to consider the constitutional validity of any provision of this title or of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

(h) The provisions of this section apply to any actions or suits pending in any court, Federal or State, on the date of enactment of this section in which no final order or judgment has been rendered. Any affected party seeking relief shall be required to follow the procedures of this title.

.01 P. L. 92-210, December 22, 1971.

[¶ 10,664]

§ 212. Personnel

(a) Any agency or officer of the Government carrying out functions under this title is authorized to employ such personnel as the President deems necessary to carry out the purposes of this title.

(b) The President may appoint five officers to be responsible for carrying out functions of this title of whom three shall be compensated at the rate prescribed for level III of the Executive Schedule (5 U. S. C. 5314) and two at the rate prescribed for level V of the Executive Schedule (5 U. S. C. 5316). Appropriate titles and the order of succession among such officers may be designated by the President.

(c) Any member of a board, commission, or similar entity established by the President pursuant to authority conferred by this title who serves on less than a full-time basis shall receive compensation from the date of his appointment at a rate equal to the per diem equivalent of the rate prescribed for level IV of the Executive Schedule (5 U. S. C. 5315) when actually engaged in the performance of his duties as such member.

EXXON CORPORATION,
Plaintiff-Appellant,

Ad Hoc Committee to Save Small Refiners, Amicus Curiae,

v.

FEDERAL ENERGY ADMINISTRATION and Frank G. Zarb, Defendants-Appellees,

Ashland Oil, Inc., Intervenor-Appellee,

and

Independent Refiners Association of America, Intervenor-Appellee.

MARATHON OIL COMPANY,
Plaintiff-Appellant,

Ad Hoc Committee to Save Small Refiners, Amicus Curiae,

v.

FEDERAL ENERGY ADMINISTRATION and Frank G. Zarb, Administrator, Defendants-Appellees,

Ashland Oil, Inc., Intervenor-Appellee,

Independent Refiners Association of America, Intervenor-Appellee,

Long Island Lighting Company et al.

Nos. 3–5, 6–8.

Temporary Emergency Court of Appeals.

April 21, 1975.

Rehearings and Rehearings En Banc Denied June 6, 1975.

Interlocutory review was sought of orders of the United States District Court for the District of New Jersey, Frederick B. Lacey, District Judge, and the United States District Court for the Northern District of Ohio, Nicholas J. Walinski, District Judge, denying motions for preliminary injunction and to certify a substantial constitutional question with reference to the "entitlement program" of the Federal Energy Administration. The Temporary Emergency Court of Appeals, Christensen, J., held that appeal from an interlocutory order granting or denying preliminary injunction may be taken only on certification by the District Court, that the TECA, in addition to district courts, may enjoin temporarily the application of a particular regulation or order to a party on original application as well as in connection with certified interlocutory appeals from orders of district courts, that the Court has a continuing duty to inquire into its jurisdiction, that improvident interlocutory appeals should not be encouraged and that instant appeals could not be taken as of right.

Appeals dismissed for lack of jurisdiction.

Hastings, J., dissented and filed opinion.

1. Courts ⇐405(14.8)

Appeal could not be taken as of right from interlocutory order of district court denying motion for preliminary injunction with reference to "entitlement program" of the Federal Energy Administration; appeal was to be by way of certification. Economic Stabilization Act of 1970, § 211(d)(2) as amended 12 U.S.C.A. § 1904 note; 28 U.S.C.A. § 1292(b); Emergency Petroleum Allocation Act of 1973, § 5(a)(1), 15 U.S.C.A. § 754(a)(1).

2. Courts ⇐405(14.8)

Certification by district courts of constitutional issues is required before the Temporary Emergency Court of Appeals may reach them, except as part of jurisdiction otherwise granted. Economic Stabilization Act of 1970, § 211(d)(2) as amended 12 U.S.C.A. § 1904 note; 28 U.S.C.A. § 1292(b).

3. Courts ⇐405(14.8)

Any appeal to Temporary Emergency Court of Appeals from an interlocutory order granting or denying a preliminary injunction may be taken only on certification by the district court. Economic Stabilization Act of 1970, § 211(d)(2) as amended 12 U.S.C.A. § 1904 note; 28 U.S.C.A. § 1292(b).

EXHIBIT B

4. Courts ⇐518(5)

The Temporary Emergency Court of Appeals, in addition to district courts, may enjoin temporarily the application of a particular regulation or order to a party on original application as well as in connection with certified interlocutory appeals from orders of district courts. Economic Stabilization Act of 1970, § 211(d)(2) as amended 12 U.S.C.A. § 1904 note.

5. Courts ⇐405(2, 12.1)

Temporary Emergency Court of Appeals has a continuing duty to inquire into its jurisdiction and should be punctilious in assuring itself that safeguards established by Congress against excessive interlocutory demands on it to the undue delay of final decisions below are not disregarded. Economic Stabilization Act of 1970, § 211(d)(2) as amended 12 U.S.C.A. § 1904 note; 28 U.S.C.A. § 1292(b).

6. Courts ⇐405(14.8)

If every refusal of a preliminary injunction as well as every such interlocutory injunction could be appealed as of right by any party irrespective of the trial court's conviction that appeal would be frivolous or would not advance the final determination of the cause and thus should not be certified to the Temporary Emergency Court of Appeals, a pattern for substantial delay of final determination in almost every such case would be ingrained into the law, contrary to the expressed intent of Congress. Economic Stabilization Act of 1970, § 211(d)(2) as amended 12 U.S.C.A. § 1904 note; 28 U.S.C.A. § 1292(b).

7. Courts ⇐405(14.8)

Virtue of ban on unlimited appeals to Temporary Emergency Court of Appeals of orders granting or denying preliminary injunctions is that groundless interlocutory appeals under the Economic Stabilization Act may be screened by the district court in the first instance, as in the case of review of constitutional problems; if preliminary relief against a regulation or order is improperly refused and the matter is deemed of sufficient importance jurisdiction of the TECA may be invoked by an original application; should the district court refuse to certify an interlocutory appeal the case in all probability could proceed to final determination below unless the TECA was convinced on a clear showing of the absence of legal foundation that prohibition, or other extraordinary remedies should issue. Economic Stabilization Act of 1970, § 211(d)(2) as amended 12 U.S.C.A. § 1904 note; 28 U.S.C.A. § 1292(b).

8. Courts ⇐405(12.1)

Improvident interlocutory appeals should not be encouraged. 28 U.S.C.A. § 1292(b).

William H. Allen, Washington, D. C., with whom John A. Hodges of Covington & Burling and Robert L. Norris, Jr., Houston, Tex., were on the brief for plaintiff-appellant Exxon Corp.

Joseph A. Califano, Jr., Washington, D. C., with whom Jerry L. Shulman and Peter B. Hamilton of Williams, Connolly & Califano, Washington, D. C., were on the brief, as amicus curiae ad hoc Committee to Save Small Refiners.

Patricia N. Blair, Atty., Dept. of Justice, with whom Carla A. Hills, Asst. Atty. Gen., New York City, and Stanley D. Rose, Atty., Dept. of Justice, were on the brief, for defendants-appellees.

Fred W. Drogula, Washington, D. C., with whom David Ginsburg and Peter H. Rodgers of Ginsburg, Feldman & Bress, Washington, D. C., and Arloe W. Mayne, Ashland, Ky., of counsel, were on the brief, for intervenor-appellee Ashland Oil, Inc.

Edwin Jason Dryer, Washington, D. C., for intervenor-appellee Independent Refiners Association of America.

George Blow, Washington, D. C., with whom Kent B. Hampton, Gen. Counsel, John L. Oberdorfer, Gail F. Borden of Patton, Boggs & Blow, Washington, D. C., and Ralph S. Spritzer, Philadelphia, Pa., of counsel, were on the brief for plaintiff-appellant Marathon Oil Co.

John J. Adams, Washington, D. C., with whom Arnold H. Quint of Hunton, Williams, Gay & Gibson, Washington, D. C., George C. Freeman, Jr., and Allen C. Barringer of Hunton, Williams, Gay & Gibson, Richmond, Va., were on the brief, for amicus curiae Long Island Lighting Co., Public Service Electric and Gas Co. and Consolidated Edison Co. of New York, Inc.

Before HASTIE, CHRISTENSEN and HASTINGS, Judges.

CHRISTENSEN, Judge:

[1-3] To reach the merits of these appeals involving denial of applications for preliminary injunctions below, we again would have to surmount a jurisdictional obstacle already recognized with reference to the absence of certification under 28 U.S.C. § 1292(b).[1]

Both of the above-entitled cases now before us involve here the same jurisdictional problem and essentially the same issues on the merits. Each appellant has asked us to grant an injunction pending appeal—in the case of Marathon "during the pendency of said appeal" and in the case of Exxon "pending its appeal". Otherwise, there has been filed directly with us no application for an injunction either preliminary or permanent, nor have the trial courts certified here any constitutional issues or interlocutory appeals.

Appellants are seeking to review orders of district courts denying motions for preliminary injunction and to certify a substantial constitutional question with reference to the "entitlement program" of the Federal Energy Administration.[2]

The jurisdictional problem arises from § 211(d)(2) of the Economic Stabilization Act of 1970, as amended, 12 U.S.C.A. § 1904 (1975 Supp.) [incorporated into the Emergency Petroleum Allocation Act of 1973, Pub.L. No. 93-159, 87 Stat. 627 by its Sec. 5(a)(1)]:

> "(2) A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it. Appeals from interlocutory decisions by a district court of the United States under this paragraph may be taken in accordance with the provisions of section 1292(b) of title 28, United States Code [section 1292(b) of Title 28]; except that reference in such section to the courts of appeals shall be deemed to refer to the Temporary Emergency Court of Appeals."

While subdivision (a) of the section thus referred to, upon which the appeals appear premised, provides for appeals as of right from orders granting or denying interlocutory injunctions, subdivision (b) to which the authorization for appeals from such orders are expressly limited by the Economic Stabilization Act as we have seen, reads as follows:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so

1. Condor Operating Co. v. Sawhill, 514 F.2d 351(Em.App.1975). "The purported appeal by the defendants from the order in question does not ameliorate the problem. They [the appellants] had no appeal as of right from the interlocutory order [granting a preliminary injunction]; they had obtained from the district court no certification for the usual interlocutory appeal, nor had they filed application with this court for leave to so appeal within the time prescribed by § 211(d)(2) of the Economic Stabilization Act with reference to 28 U.S.C. § 1292(b) ." We held in that case, however, that certification of a constitutional issue by the trial court, not present in the case at bar, invested us with jurisdiction to consider related problems.

2. 39 Fed.Reg. 42246 (Dec. 4, 1974) as amended 39 Fed.Reg. 44710 (Dec. 27, 1974), 40 Fed.Reg. 2559 (Jan. 13, 1975).

state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

To read § 211(d)(2) of the Economic Stabilization Act with reference to our jurisdiction on appeal to mean that appeals from interlocutory orders denying or granting injunctions may be taken "in accordance with the provisions of section 1292(a) . . ." rather than, or in addition to, "the provisions of section 1292(b) . . ." would do violence to the language of our jurisdictional charter. The two subdivisions were designed to reach different subject matters; one does not lend itself to an interpretation that includes the other, for that would "effectively turn 1292 upon its head". Cf. Tidewater Oil Co. v. United States, 409 U.S. 151, 93 S.Ct. 408, 34 L.Ed.2d 375 (1972).

The meaning being so facially clear, to seek qualifications or reversal through contextual implications or legislative history seems somewhat gratuitous. Yet both support acceptance of the plain meaning of the employed language.

When the Economic Stabilization Act of 1970 (Pub.L. No. 91–379) was adopted originally no provisions relating to judicial review were specified. Thus, apart from final judgments, any interlocutory orders that district courts might have granted within the parameters of the Administrative Procedure Act and the Rules of Civil Procedure, were reviewable in courts of appeal under § 1292—if granting or denying a preliminary injunction, by appeal as of right by virtue of its subsection (a); and as to any other interlocutory order upon certification below and within the discretion of the appellate court as permitted by its subsection (b).

Section 211 of the Act, specifically providing for, and regulating, judicial review, was added by the Economic Stabilization Act Amendments of 1971 (Pub.L. No. 92–210). The 1973 amendments to the statutes did not change this section.

The precursor of Section 211 was a bill sent by the President to Congress as a part of a message following the announcement of Phase II to extend and amend the Economic Stabilization Act of 1970. The proposal for the creation of the Temporary Emergency Court of Appeals of the United States was that it should "have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title except that the court shall not have power to issue any interlocutory decree staying or restraining, in whole or in part, any provision of this title, or the effectiveness of any regulation or order issued thereunder." The bill would have provided for the certification of constitutional questions to this court by district courts but would have precluded district courts from granting even permanent injunctions, which would have to be issued by the Temporary Emergency Court of Appeals upon appeal from final declaratory judgments or after hearing in this court upon recommendation of a district judge, or by the Supreme Court.

After holding hearings on the administration bill, the Senate Banking Committee reported a clean bill, S. 2891, which contained the precise language later enacted as Section 211. The explanation contained in the Senate Committee report included the following comments (U.S.Code Cong. & Ad.News 1971, pp. 2292–4):

> "The judicial review provision has been written with several important principles in mind: (1) speed and consistency of decisions in cases arising under the Act, (2) avoidance of any breaks or stays in the operation of the Stabilization Program, and (3) relief for particular persons aggrieved by the operation of the program.
>
> . . . . .

"A preliminary limitation is set upon the power of this new court. It may issue, with one exception, no interlocutory or temporary order staying or restraining in whole or in part any provision of the Act or the effectiveness of any regulation or order issued pursuant to the Act. The sole exception is that it may issue a temporary injunction restraining the application of a particular regulation or order to a person who is a party to litigation before it. In all other respects the Temporary Emergency Court of Appeals shall have all the powers of a circuit court of appeals."

The Senate Committee's report also states, inter alia:

"Several subsections are devoted to making explicit, the precise authority and limitations on authority that are being placed on the courts considering cases and controversies arising under this Act and in reviewing the decisions of lower courts in these matters.

. . . . . .

"In order to provide relief for a particular person who may be aggrieved by the operation of this program during the period in which he is attempting to establish his legal position, a district court or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular regulation or order issued under the Act to a person who is a party to litigation before it. To insure speedy disposition of this matter, an appeal may be taken from the granting of such an injunction from the district court to the Temporary Court of Appeals pursuant to the procedure provided in 28 USC 1292(b) for appealing interlocutory appeals in expedited form."

A floor amendment to the judicial review section was offered by Senator Metcalf and defeated. The amendment, if it had been adopted, among other things, would have permitted review of interlocutory injunctions by the Temporary Emergency Court of Appeals in the usual way they would be reviewable by courts of appeal. As Senator Metcalf expressed it: "In short, it would provide what exists today—those legal rights that are presently operating under the Economic Stabilization Act of 1970." Senator Tower made a statement in which he said that the amendment would pose a serious threat to the program. Senator Sparkman said that he hoped the amendment would not be agreed to "because I think it would break up entirely something that we worked long and hard to achieve." 117 Cong.Rec. 43478–9 (Nov. 30, 1971).

The House version, H.R. 11309 was passed on Dec. 10, 1971. Specifically as to interlocutory appeals it would have provided: "The Temporary Emergency Court of Appeals shall not have the power to issue any interlocutory decree staying or restraining, in whole or in part, any provision of this title or the effectiveness of any regulation or order issued under this title." Permanent injunctions would have been issued "by the Temporary Emergency Court of Appeals upon appeal, or, after hearing, upon recommendation of a United States district court or judge thereof. Such an injunction may also be issued by the United States Supreme Court as provided for by this section."

Because of differences in the House and Senate versions, the proposed amendments were sent to a conference committee which adopted the Senate version. The conference report states in part that "[t]he House bill differed from the Senate bill . . . in that . . . it gave no injunctive authority to the district courts." S.Rep. No. 92–579, 92d Cong., 1st Sess. 20–21 (1971). The conference report was agreed to by both houses and the Act, reflecting the Senate version, was signed into law on Dec. 22, 1971.

The legislative history makes plain at least that alteration of traditional judicial review provisions was intended. And there is nothing to indicate that the specific provisions for review as expressed in the Act were not intended.

In addition to the plain language of the particular subsection under discussion, and the legislative history bearing upon it, the context of the entire section itself demonstrates that the changes reflected in § 211(d)(2) were both intended and carefully considered.

The grant to this court of exclusive jurisdiction over all appeals from district courts of the United States in cases and controversies arising under this title is limited by the phrase, "Except as otherwise provided in this section . . ." (§ 211(b)(2).)

The certification by district courts of constitutional issues is required before this court may reach them except as a part of jurisdiction otherwise granted. Subject to this power of determination upon certification below, ". . . no order of such agency shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence." (§ 211(d)(1).)

As noticed above, however, "A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it", but appeals from such interlocutory decisions by a district court "may be taken in accordance with . . . section 1292(b) . . . ." (§ 211(d)(2).) "Except as provided in subsection (d) of this section, no interlocutory or permanent injunction . . . shall be granted by any district court of the United States . . . ." (§ 211(e)(1).)

If (d)(2) were to be read as meaning that appeals may be taken in accordance with § 1292(a), there would be a direct contradiction in terms. If the subsection were thought to be merely permissive in this respect, leaving subsection (a) to be utilized as a matter of right anyway, reference to subdivision (b) would indicate some mindless aberration which surely this court should not imply, and cannot fairly imply for the reasons heretofore discussed and those to be stated later. Equally as insupportable would be to read the reference to subsection (b) as intending to provide: "In addition to the jurisdiction provided by subsection (a) above, the Temporary Emergency Court of Appeals shall have the jurisdiction provided by subsection (b) to review interlocutory orders." The "puzzling" nature of this section which still remains in the view of Exxon if one of these other interpretations is adopted can only be resolved by accepting the plain language of the statute.

Thus, it is clear from (d)(2) in view of all other available guides, that any appeal to this court from an interlocutory order granting or denying a preliminary injunction may be taken only on certification by the district court. Why should this be more strange than certification procedure for reference to this court of interlocutory constitutional questions? If there were an appeal as of right from orders denying preliminary injunctions or restraining orders, the certification of interlocutory constitutional problems would be rather meaningless; all a party seeking an interim review here would have to do would be to request and be refused a restraining order or preliminary injunction. Appeals as of right concerning both interim constitutional problems and interlocutory injunction decisions could well have been thought by Congress to invite delays in the progress of these cases to final judgment in the district court. Our experience has been that district courts have been perhaps overly prone to certify interim constitutional problems to this court See *e. g.*, Shapp v. Simon, 510 F.2d 379 (Em.App. 1975). There is little reason to suppose that if the requirement of § 211(d)(2) is adhered to substantial questions will not be certified as to rulings on applications for interlocutory injunctions where any reasonable justification appears.

[4] Should this not prove correct in every instance, parties still would not be left "at the mercy" of judges who unreasonably refuse to certify pursuant to the

reference of § 211(d)(2), although this possibility has not been thought to constitute any real objection to the existence of discretionary appeals in ordinary context. Subsection (d)(2) itself provides in effect that the Temporary Emergency Court of Appeals, in addition to district courts, may enjoin temporarily the application of a particular regulation or order to a party upon original application here as well as in connection with certified interlocutory appeals from orders of district courts. In Pacific Coast Meat Job. Ass'n, Inc. v. Cost of Living Coun., 481 F.2d 1388 (Em.App.1973), a case cited by Exxon as one at variance with the present interpretation of § 211(d)(2), this court in addition to the usual appeal had before it an original application for an injunction filed with this court which it denied in connection with its reversal of the judgment of the lower court. While the question was not discussed, in our present view we in any event did have jurisdiction of the original application and perhaps pendant jurisdiction of the appeal.

Also relied upon by Exxon as being inconsistent with the *Condor* view of § 211(d)(2) is County of Nassau v. Cost of Living Council, 499 F.2d 1340 (Em. App.1974), and McGuire Shaft & Tunnel Corp. v. Local U. No. 1791, U.M.W., 475 F.2d 1209 (Em.App.1973), cert. denied, 412 U.S. 958, 93 S.Ct. 3008, 37 L.Ed.2d 1009 (1973). In the same connection could have been added League of Vol. Hosp. & H. of N. Y. v. Local 1199, Drug & H. U., 490 F.2d 1398 (Em.App.1973). It is true that a threshold question of jurisdiction was considered in *County of Nassau*, but this was made to depend solely upon whether there was any distinction under the circumstances between temporary restraining orders and preliminary injunctions; insofar as the opinion discloses the problem with which we are confronted here was neither presented nor ruled upon. *McGuire Shaft & Tunnel Corp.* did not involve a § 211 situation at all, but turned upon § 210(a), since relief was sought for violation of administrative orders, not against their application or operation, this court stating (475 F.2d at 1214):

> "Clearly, the limitations on the federal courts' authority to enjoin agencies of the government in the execution of the act, orders, and regulations thereunder were not considered synonymous with the right of an individual injured by violations of the program to enjoin those violations."

League of Voluntary Hospitals did not consider the problem either. But the latter decision underscores the dichotomy, if not paradox, which is presented by an interlocutory appeal as of right from an order granting or denying a preliminary injunction through which constitutional issues can be adjudicated here, and the requirement of certification to this court of constitutional issues as a condition for interlocutory review.

[5] We no longer can delay directly facing up to the jurisdictional problem recognized but determined only in passing in *Condor*. Not only do we have a continuing duty to inquire into our jurisdiction as such, but we should be punctilious also in assuring ourselves that safeguards established by Congress against excessive interlocutory demands upon us to the undue delay of final decision below are not disregarded.

[6] If, as the parties claim, every refusal of a preliminary injunction as well as every such interlocutory injunction can be appealed as of right by any party irrespective of the trial court's conviction that appeal would be frivolous or would not advance the final determination of the cause and thus should not be certified to this court, a pattern for substantial delay of final determination in almost every such case would be engrained into the law contrary to the expressed intent of Congress.[3] Moreover, such un-

3. Tidewater Oil Co. v. United States, 409 U.S. 151, 93 S.Ct. 408, 34 L.Ed.2d 375 (1972), construing in different context § 1292(b) as pertaining to orders other than those granting or denying preliminary injunctions is not inconsistent in the present entirely dissimilar con-

certified appeals, which usually involve constitutional attacks, in effect would wash out any significance of § 211(c) concerning the certification of interlocutory constitutional issues. The interruption of proceedings in district courts by appeals of right from all of such interlocutory orders, which are customarily sought in the first instance, is a prospect which the Congress did not have to invite, whether wise or unwise. Such appeals however unmeritorious are always time consuming, not infrequently premature and often present problems which could be better considered by us following development of a more adequate record by the trial courts.

[7, 8] There, indeed, may be much to commend the Congressional plan in preference to such a system for unlimited appeal of orders granting or denying preliminary injunctions. Groundless interlocutory appeals under the Act may be screened by the district court beneficially in the first instance, as in the case of the review of constitutional problems. Improvident interlocutory appeals should not be encouraged. If the granting of preliminary relief against application of a regulation or order is improperly refused and the matter is deemed of sufficient importance, our jurisdiction may be invoked by an original application which we can reject without interruption of the proceedings below, or grant if a sufficient showing is made to warrant this action. Should the district court refuse to certify an interlocutory appeal from an order granting an injunction, the case in all probability better could proceed to final determination below anyway unless this court is convinced upon a clear showing of the absence of legal foundation that prohibition, or other extraordinary remedy should issue. If the granting of such preliminary injunction is within the discretion of the trial court and thus not amenable to extraordinary relief here, the probability of our overruling the exercise of that discretion even on interlocutory appeal could be minimal. But irrespective of whether the system mandated by Congress is the best one, we are bound to give it effect, no constitutional obstacle appearing.

The appeals are hereby dismissed for lack of jurisdiction in this court.

HASTINGS, Judge (dissenting).

The statement in Section 211(d)(2) of the Economic Stabilization Act, 12 U.S.C. § 1904 note, that appeals from decisions of district courts respecting injunctions "may be taken in accordance with the provisions of section 1292(b) of title 28, United States Code . . .," presents this court with a difficult question of interpretation. There seem to be two possible interpretations of the provision. Either the mention of § 1292(b) precludes appeals pursuant to § 1292(a)(1), or the latter provision remains available. The two interpretations are each, at least in some respect, unsatisfactory. In light of the congressional policy behind the judicial review provisions of the Economic Stabilization Act, I find the majority's view that § 1292(a)(1) review is precluded the far less satisfactory interpretation and I therefore dissent.

The majority holds that it was the intent of Congress to limit the appellate jurisdiction of the Temporary Emergency Court of Appeals over orders granting or denying preliminary injunctions to those which have been certified by the district court under 28 U.S.C. § 1292(b). A complete review of the legislative history of the Act reveals only a single

text with its applicability to the latter orders in view of the express provisions of the Economic Stabilization Act. It seems quite clear in the present context that when Congress expressly stated in a single subsection that a "district court . . . may enjoin temporarily . . . the application of a particular regulation or order . . ." and that "[a]ppeals from interlocutory decisions by a district court . . . under this paragraph may be taken in accordance with the provisions of section 1292(b) . . .", it did not mean that such appeals could not be taken by virtue of subsection (b) if the order was one "enjoined [ing] temporarily . . . the application of a particular regulation or order . . ."

mention of 28 U.S.C. § 1292(b) in all of the committee reports and debates on the floor of the House and Senate. That single sentence, in the Senate committee report, does little more than restate the language of the statute:

> To insure speedy disposition of this matter, an appeal may be taken from the granting of such an injunction from the district court to the Temporary Emergency Court of Appeals pursuant to the procedure provided in 28 USC 1292(b) for appealing interlocutory appeals in expedited form. S.Rep. No. 92-507, 92d Cong., 1st Sess. 12 (1971); U.S.Code Cong. & Ad.News, p. 2294 (1971).

I cannot join the majority's conclusion that any decision to limit review to the provisions of § 1292(b) was "both intended and carefully considered."

If Congress had in fact intended to restrict review of orders concerning injunctions to those certified by the district court, any careful consideration of the language of § 1292(b) and the cases which have interpreted it would have revealed that § 1292 would not be an appropriate vehicle to "insure speedy disposition" of orders respecting preliminary injunctions.

The Supreme Court in Tidewater Oil Co. v. United States, 409 U.S. 151, 93 S.Ct. 408, 34 L.Ed.2d 375 (1972), concluded that the statute's legislative history demonstrated "that § 1292(b) was intended to establish jurisdiction in the courts of appeals to review interlocutory orders, other than those specified in § 1292(a), in civil cases in which they would have jurisdiction were the judgments final." *Id.* at 168, 93 S.Ct. at 418 (footnote omitted). The Court further stated that "§ 1292(b) was intended to supplement § 1292(a), not to provide a substitute for it." *Id.* at 168 n. 41, 93 S.Ct. at 418. The Court went on to consider, in dicta, the possible usefulness of § 1292(b) in securing review of orders concerning preliminary injunctions in a class of cases where resort to § 1292(a) was precluded. The Court said, "[T]he fact is that permitting interlocutory appeal under § 1292(b) would not bring these orders and the related evidence before the courts of appeals since they come within § 1292(a)(1)." *Id.* at 172 n. 47, 93 S.Ct. at 420. The implication of this observation for our jurisdictional question is clear. If, as the majority holds, § 211(d)(2) of the Economic Stabilization Act prevents use of § 1292(a)(1) to appeal orders granting or denying preliminary injunctions, then the certification procedure of § 1292(b) could not be used to appeal such orders either.

The Supreme Court's observation was based on careful consideration of legislative history. The Court's analysis is persuasive and should be followed here. But even if we were to reject as dicta the Supreme Court's conclusion that § 1292(b) is wholly unavailable to review a preliminary injunction decision, § 1292(b), if available, would be a very awkward and inappropriate mechanism for such review.

The language of 28 U.S.C. § 1292(b) only makes sense if it supplements review as of right from orders concerning preliminary injunctions rather than supplants it. The section begins "when a district judge, in making in a civil action an order not otherwise appealable under this section . . ." Since § 1292(a)(1) permits review of injunctive orders, by its own terms, the procedures of § 1292(b) are not to be applied to appeals from injunctions.

The standards for certification under § 1292(b) were not designed to be and are not suitable for application to preliminary injunctions. Section 1292(b) requires a "controlling question of law," but the controlling issues in a preliminary injunction proceeding are in large part factual, such as whether there is irreparable harm to the plaintiff, whether harm to the defendant if an injunction is granted would outweigh benefit to the plaintiff, and whether an injunction would serve the public interest. There is substantial precedent supporting the view that § 1292(b) certification is inappropriate in matters that lie with-

in the discretion of the district court,[1] but the issuance of a preliminary injunction is "committed to the sound judicial discretion of the trial court." League of Voluntary Hospitals v. Local 1199, Drug & Hospital Union, 490 F.2d 1398, 1401 (Em.App.1973).

While the legislative history of the Economic Stabilization Act fails to demonstrate a clear intent to restrict review of decisions about preliminary injunctions to the procedures of § 1292(b), it does contain a detailed statement of the congressional policies which the judicial review provisions were designed to implement:

> The judicial review provision has been written with several important principles in mind: (1) speed and consistency of decisions in cases arising under the Act, (2) avoidance of any breaks or stays in the operation of the Stabilization Program, and (3) relief for particular persons aggrieved by the operation of the program. S.Rep. No. 92–507, 92d Cong., 1st Sess. 10 (1971); U.S.Code Cong. & Ad.News, p. 2292 (1971).

Limiting appeals from orders concerning preliminary injunctions to those certified pursuant to § 1292(b) would be likely to produce delay and inconsistency rather than further the legislative intent. Considering the inapplicability of the requirements for a certification under § 1292(b) to preliminary injunction questions, a district court would often be correct in refusing to certify its order for appellate review. As a result, district court orders inconsistent with decisions of the Temporary Emergency Court of Appeals could remain in effect for substantial periods of time. While a party who had been denied preliminary relief in the district court could petition our court directly for an injunction, the party aggrieved by the issuance of an injunction by the district court would have no such alternative available. Thus, the situation Congress most feared, of injunctions creating breaks or stays in the program, is furthered by limiting review to § 1292(b).

The general design of the jurisdictional review provisions of the Economic Stabilization Act is to limit the relative authority of the district courts and to concentrate authority in our court. Limiting review of injunction orders to those properly certified under § 1292(b) would make district courts in cases arising under the Economic Stabilization and Emergency Petroleum Allocation Acts more powerful than they would be in other cases and our court less powerful than other courts of appeals. The district courts would have what the Supreme Court has described as "virtually unlimited authority over the parties in an injunctive proceeding." Sampson v. Murray, 415 U.S. 61, 87, 94 S.Ct. 937, 951, 39 L.Ed.2d 166 (1974).

The holding of the majority here that § 1292(b) is the only avenue of appeal for orders respecting preliminary injunctions is not only inconsistent with the well-developed interpretation of § 1292(b) and the legislative policies behind the Economic Stabilization Act, but it is also inconsistent with the prior uniform practice of our court in hearing appeals from preliminary injunction decisions without requiring a § 1292(b) certification.

In Pacific Coast Meat Jobbers Ass'n v. Cost of Living Council, 481 F.2d 1388 (Em.App.1973), our court heard and decided an appeal by private parties which had been denied a preliminary injunction. While the court also had before it an original application for a preliminary injunction, the opinion of the court leaves no question that it was deciding both the preliminary application and the appeal. In *League of Voluntary Hospitals, supra*, the court stated that the case before it was "an appeal, pursuant to Section 211 of the Economic Stabilization Act" from an order granting a preliminary injunction, yet the court did not

1. 9 Moore's Federal Practice ¶ 110.22[2] at 261 (2d ed. 1973); C. Wright, Law of Federal Courts § 102 at 463 (2d ed. 1970). *But see* Katz v. Carte Blanche Corp., 3 Cir., 496 F.2d 747, 752–756, cert. denied, 419 U.S. 885, 95 S.Ct. 152, 42 L.Ed.2d 125 (1974).

find it necessary to discuss any possible jurisdictional obstacles to its hearing the case.

In County of Nassau v. Cost of Living Counc 499 F.2d 1340 (Em.App.1974), our court heard appeals by a government agency from a series of decisions of a district court granting among other relief, a temporary restraining order. In *County of Nassau* the jurisdictional question was explicitly considered. The court said:

> At the threshold a question arises whether the temporary restraining order against the COLC's temporary order is appealable. We hold that it is appealable under the rationale of Sampson v. Murray, 415 U.S. 61, 94 S.Ct. 937, 39 L.Ed.2d 166 (decided Feb. 19, 1974) . . . . 499 F.2d at 1343.

In Sampson v. Murray, the Supreme Court held that a temporary restraining order would be considered as a preliminary injunction so that review under 28 U.S.C. § 1292(a)(1) would be available. The Court reasoned:

> A district court, if it were able to shield its orders from appellate review merely by designating them as temporary restraining orders, rather than as preliminary injunctions, would have virtually unlimited authority over the parties in an injunctive proceeding. 415 U.S. at 86–87, 94 S.Ct. at 951.

Since *Sampson* was an interpretation of § 1292(a)(1), our court's reliance upon that case is an implicit holding that the provisions of 28 U.S.C. § 1292(a)(1) permit our court to hear appeals from decisions concerning preliminary injunctions without a certification

In light of this precedent, the inutility of § 1292(b) in reviewing preliminary injunction orders and the legislative policies behind the judicial review provisions of the Economic Stabilization Act, I would hold that § 211(d)(2) of the Act does not preclude this court's jurisdiction over appeals pursuant to 28 U.S.C. § 1292(a)(1). While I recognize that this holding would render the reference to § 1292(b) in § 211(d)(2) superfluous, I believe it achieves a far more satisfactory result than the holding of the majority.

entitled to a registration of the mark *now*, or as of a date no earlier than its February 1969 filing date. In this case, as in *DeWalt*, the record shows that as of the time the TTAB determined to refuse registration, the nationwide situation with respect to the use of GIANT FOOD and confusingly similar marks was such that the mark did not serve to distinguish appellant's services from those of many others, regardless of what rights those "others" had to use the same or similar marks. On the time as of which registrability is to be determined, see also *In re Thunderbird Products Corp.*, 406 F.2d 1389, 56 CCPA 969 (1969).

The evidence was entirely sufficient, at least prima facie, to support the TTAB's refusal to register and to show that appellant is not entitled to a registration carrying, nationwide, the presumptions attaching by reason of § 7(b). GIANT FOOD has been shown not to be capable, across the nation, of distinguishing appellant's services from the services of others, and the mark does not fall within § 2(§ 3). Appellant has not contradicted the evidence; indeed, its own witness seemed well aware of the situation and was shut off by counsel from saying more about it than he did. I know of no basis for the majority's statement that appellant has had no opportunity to rebut the evidence. Certainly the record does not show appellant ever attempted to do so. It is clear to me that it would not be possible to rebut the existence of the "Yellow Pages" listings or the GIANT FOOD markets that the affiant visited, described, and photographed. No further evidence is necessary.

For the foregoing reasons I would affirm the board.

Robert William SPINETTI et al., Plaintiffs-Appellants,

v.

ATLANTIC RICHFIELD COMPANY, Defendant-Appellee.

Nos. 9-20 and 9-21.

Temporary Emergency Court of Appeals.

Aug. 18, 1975.

Petroleum distributors brought action against oil company for, inter alia, injunctive relief from the alleged termination of distributor agreements with the company. The United States District Court for the Northern District of California, entered orders denying distributors' motions for preliminary injunctions and the distributors appealed. The Temporary Emergency Court of Appeals, Estes, J., held that the court did not have jurisdiction of the counts charging antitrust violations, violation of the fair trade laws of California and charging oil company with inducing the distributors to make substantial investments on the basis that their distributor agreements would not be cancelled since such claims were not controversies arising under any title of the Economic Stabilization Act or the Allocation Act; and that the distributors, as private parties, were not entitled to appeal as of right from the interlocutory orders denying preliminary injunctive relief and the court did not have jurisdiction.

Appeal dismissed and case remanded.

1. Courts ⇐518(5)

Where counts of petroleum product distributors' complaint which charged antitrust violations, violations of the fair trade laws of California and which charged oil company with inducing distributors to make substantial investment on the basis that their distributor agreements would not be cancelled in absence of breach by them were not controver-

EXHIBIT C

sies arising under any title of Economic Stabilization Act or the Allocation Act or under any regulations or orders issued thereunder, the Temporary Emergency Court of Appeals did not have jurisdiction of the distributors' appeal from denial of injunctive relief. Economic Stabilization Act of 1970, § 201 et seq. as amended 12 U.S.C.A. § 1904 note; Emergency Petroleum Allocation Act of 1973, §§ 1 et seq., 5(a)(1), 15 U.S.C.A. §§ 751 et seq., 754(a)(1); 28 U.S.C.A. § 1291.

2. Courts ⇐159

Courts of special jurisdiction should strictly construe their statutory grants of jurisdiction.

3. War and National Emergency ⇐38

Where petroleum distributors were not aggrieved by declaration of a district court respecting the validity of any regulation or order issued under the Economic Stabilization Act and no motion for injunctive relief was filed by the distributors in the Temporary Emergency Court of Appeals within the statutory 30-day period and no proper application for injunctive relief supported by necessary papers and motions was made, the distributors' action against oil company for violation of rules and regulations of the oil allocation program would not be construed as an original application for preliminary injunction. Economic Stabilization Act of 1970, §§ 210(a), 211, 211(e)(2) as amended 12 U.S.C.A. § 1904 note.

4. Courts ⇐405(14.8)

Petroleum distributors, as private parties, were not entitled in a suit for injunctive relief under the Economic Stabilization Act to appeal as a matter of right from an interlocutory order denying preliminary injunctive relief which was sought to restrain oil company from terminating distributor agreements and the closing of certain bulk plant facilities. Economic Stabilization Act of 1970, §§ 210(a), 211(e)(2) as amended 12 U.S.C.A. § 1904 note; 28 U.S.C.A. § 1292(a).

Francis O. Scarpulla, San Francisco, Cal., with whom Josef D. Cooper and Linda L. Tedeschi, Cooper & Scarpulla, San Francisco, Cal., were on the brief for plaintiffs-appellants.

F. Bruce Dodge, San Francisco, Cal., with whom Kenneth R. Clegg, Morrison & Foerster, San Francisco, Cal., were on the brief for defendant-appellee.

Before CARTER, CHRISTENSEN and ESTES, Judges.

ESTES, Judge.

These consolidated appeals by the original plaintiff, Robert W. Spinetti, and by plaintiffs Douglas Hughes, W. G. Zandell, and Gordon H. Wallace, who were added as parties plaintiff in the Plaintiffs' Amended Complaint filed Feb. 28, 1975, are from orders of the United States District Court for the Northern District of California denying plaintiffs' motions for preliminary injunctions against the defendant, Atlantic Richfield Company (ARCO), restraining the alleged termination of certain Commission Distributor Agreements between each of the plaintiffs individually, and the defendant, and the closing of certain bulk plant facilities owned by ARCO and which were used and maintained by each of the plaintiffs.

The plaintiffs alleged, *inter alia*, that on specified dates they respectively entered into agreements with the defendant, ARCO, for the distribution of petroleum products in specific areas of California and Oregon. Their original and amended complaints contained several counts, the first of which charged antitrust violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Section 7 of the Clayton Act, 15 U.S.C. § 18, and sought relief under Section 4 of the Clayton Act, 15 U.S.C. § 15, and under the injunctive provisions of Section 16 of the Clayton Act, 15 U.S.C. § 26. The second count alleged violation of the Fair Trade laws of California. Count three alleged that "[t]he termination of the contract between plaintiff and defendant is a violation of the rules

and regulations of the oil allocation program and other federal regulatory statutes and rules to which (sic), Sections 205.190–195, 205.200–203, 210.62, *et seq.*, 211.9, *et seq.*, and 212.83, *et seq.*, of the Petroleum Allocation and Price Regulations of the Federal Energy Office." In supplemental memorandums filed in the District Court in support of their motions for preliminary injunctions, plaintiffs more specifically alleged that the termination of their distributor agreements with ARCO was a violation of 10 CFR § 211.9, which requires, prior to the termination of a supplier-wholesale-purchaser-reseller relationship, the approval of the Federal Energy Administration (F.E.A.).[1] Plaintiffs also alleged that the closure of the bulk plants used by them would effect certain changes in the normal business practices of ARCO, in violation of 10 CFR § 210.62. The consequence of both actions by ARCO was also alleged to be a violation of 10 CFR § 210.62 by reason of the effect on their customers. Count four, added by the Amended Complaint, charged the defendant with inducing plaintiffs Hughes, Zandell, and Wallace to make substantial investments on the basis that their distributor agreements would not be canceled in the absence of breach by them.

Spinetti's motion for a preliminary injunction, filed February 14, 1975, was denied by the district court on March 6, 1975, and a notice of appeal therefrom was filed in this court on March 13, 1975. On March 31, 1975, the district court denied preliminary injunctive relief to plaintiffs Hughes, Zandell, and Wallace on their motion of March 7, 1975. Notice of appeal was filed by these plaintiffs with this court on April 11, 1975.

[1, 2] Plaintiffs made no allegation of jurisdiction under the Emergency Petroleum Allocation Act of 1973, Pub.L. No. 93–159, 87 Stat. 627 (Allocation Act), in their complaints in the District Court or on this appeal. The Temporary Emergency Court of Appeals (T.E.C.A.) has no jurisdiction, under the judicial review provisions of the Economic Stabilization Act of 1970, Pub.L. No. 91–379, 84 Stat. 799, as amended, (ESA) 12 U.S.C. § 1904 note, [incorporated into the Allocation Act by § 5(a)(1) thereof], of counts I, II, and IV of the plaintiffs' complaint since such claims are not controversies arising under any title of the Economic Stabilization Act or the Allocation Act or under regulations or orders issued thereunder. The antitrust, Fair Trade, and contractual claims are appealable only to the Ninth Circuit Court of Appeals under 28 U.S.C. § 1291. *Cf. Associated Gen. Con., Okl. Div. v. Laborers Int. U., Loc. 612*, 489 F.2d 749, 751 (Em.App.1974). As stated in *United States v. Cooper*, 482 F.2d 1393, 1398 (Em.App.1973): "[C]ourts of special jurisdiction should strictly construe their statutory grants of jurisdiction." Accord, *United States v. State of California*, 504 F.2d 750, 754 (Em.App.1974), *cert. denied*, —— U.S. ——, 95 S.Ct. 2423, 44 L.Ed.2d 684 (1975).

Following the decisions of *Exxon v. FEA*, 516 F.2d 1397, 3 CCH Energy Management ¶ 26,019, at p. 26,171 (T.E.C.A.1975), and *Gulf Oil Corp. v. FEA*, 521 F.2d 810 (Em.App.1975), this court directed the parties herein to file supplemental briefs on two questions: the question of this court's jurisdiction under section 210(a) of the ESA to review on appeal the order of the district court denying preliminary injunctive relief in this case, and the effect of the non-joinder of the FEA where its regulations and their interpretation are in controversy. The appellants contend that jurisdiction is present in this case by virtue of their reliance upon section 210(a) rather than section 211 and the absence of any non-private parties; or in the alternative, that their appeal should be construed as an original application for a

1. Under section 5(a) of Executive Order No. 11790, (39 F.R. 23,185, June 25, 1974) Providing for the Effectuation of the Federal Energy Administration Act of 1974, (Pub.L. No. 93–275), the Federal Energy Office was abolished on June 27, 1974, the effective date of the Act, and its functions were continued under the Federal Energy Administration.

preliminary injunction under section 211(e)(2).

[3] This court must initially indicate that the appellants were not "aggrieved by a declaration of a district court of the United States *respecting the validity* of any regulation or order issued under this title" [emphasis added] within the meaning of section 211(e)(2); and assuming, *arguendo*, such was the case, no motion for injunctive relief was filed by appellants in this court within the requisite 30-day period of section 211(e)(2). In *Pacific Coast Meat Job. Ass'n, Inc. v. Cost of Living Coun.*, 481 F.2d 1388 (T.E. C.A.1973), this court considered an original application for preliminary injunctive relief; however, there it was filed two days after the district court declared valid the Cost of Living Council's Special Price Rules for Food, which maintained the price ceiling on beef while lifting the ceiling for most other meats. Moreover, no proper application for injunctive relief supported by the necessary papers and motions was made in this court. The appellants' alternative contention for jurisdiction as an original application for injunctive relief under section 211(e)(2), is rejected.

[4] Thus, to be heard on the merits of their appeal, appellants must show that as private parties, they are entitled, in a suit brought under section 210(a) against another private party, to appeal as a matter of right under 28 U.S.C. § 1292(a) from the denial of preliminary injunctive relief by the court below. In *Exxon v. FEA, supra*, this court made a comprehensive analysis of the legislative history of the provisions for judicial review provided to parties involved in actions arising under the ESA and the Allocation Act. This court there concluded "that any appeal to this court from an interlocutory order granting or denying a preliminary injunction may be taken only on certification [under 28 U.S.C. § 1292(b)] by the district court." (3 CCH Energy Management at p. 26,175.) Following the *Exxon, supra*, decision, this court dismissed an appeal from an order denying a preliminary injunction in a similar action brought by Gulf Oil Corporation, for lack of jurisdiction, stating that: "[S]ection 211(d)(2) of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note, which defines our appellate jurisdiction, does not permit an appeal of right to this court from an order granting or denying a preliminary injunction." *Gulf Oil Corp. v. FEA*, 521 F.2d 810 (Em.App.1975).

While these precedents seem clear, the appellants' misconceptions regarding our jurisdiction on review of interlocutory injunctive decrees of district courts in private actions warrants further discussion. Appellants would contend that a section 1292(b) certification is required only in a government action. In so doing they rely upon an artificial separation of the subdivisions of section 211 to show that government appeals may be taken only under section 211(d)(2), while private appeals may be taken under sections 211(b)(2) and (e)(2). Section 210(a) states that "Any person suffering legal wrong because of any act or practice arising out of this title . . . may bring an action in a district court of the United States . . ., including . . . an action for a . . . writ of injunction (*subject to the limitations in section 211*)." [emphasis added]. Whether the application is submitted by the agency to enforce a regulation or by a private party attacking the regulation is a matter of no substantial difference. In either case the regulation itself is under consideration. The posture of the case having been commenced by a private party or the agency is a difference without meaning. Nor does any attempted differentiation between mandatory injunctions and prohibitory injunctions furnish a basis for our appellate jurisdiction in disregard of section 211. If the appellants' theory were correct, the parenthetical phrase in section 210(a) would be completely meaningless, as section 211(b)(2) and section 211(e)(2) contain no limitations on the granting of injunctions. In fact, section 211(e)(2) expands the availability of injunctive relief under the Allocation Act by granting this court origi-

nal jurisdiction to consider such relief under certain specified circumstances.

Appellants would further rely on this court's statement in *McGuire Shaft & Tunnel Corp. v. Local U. No. 1791, U. M. W.*, 475 F.2d 1209, 1213 (Em.App.1973), that:

> "The restrictions in § 211 are directed at limiting the power of the judiciary to impede the enforcement, operation, or execution of the Economic Stabilization Program. Since the cases *sub judice* are not concerned with enjoining the implementation of the stabilization program, but rather with enjoining violations thereof, the provisions of § 211 are inapplicable."

However, this statement was made in the context of interpreting the authority of a district court *ab initio* to issue injunctions against violations of the ESA on behalf of private parties. The legislative history of section 210(a) and section 211 of the ESA was there considered only as it pertained to the intent of Congress to provide individuals with the right to bring an action for injunctive relief. The question of this court's jurisdiction over the appeal by the defendants therein from the district court's granting of injunctive relief was not raised. Interpreting the legislative intent behind section 211 as it pertains to our jurisdiction to review appeals from interlocutory decisions in the district courts, this court in *Exxon, supra*, stated:

> "Appeals as of right concerning both interim constitutional problems and interlocutory injunction decisions could well have been thought by Congress to invite delays in the progress of these cases to final judgment in the district court. . . . The interruption of proceedings in district courts by appeals of right from all of such interlocutory orders, which are customarily sought in the first instance, is a prospect which the Congress did not have to invite, whether wise or unwise. Such appeals however unmeritorious are always time consuming, not infrequently premature and often present problems which could be better considered by us following development of a more adequate record by the trial courts." (3 CCH Energy Management at pp. 26,175–176).

With the *Exxon, supra*, decision before us, and the language of section 211(b)(1) of the Act mandating that this court "exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases over which it has jurisdiction under this title" there appears no compelling distinction between an appeal by an individual and that by the government which would warrant a decision contrary to that expressed in *Exxon, supra*, and *Gulf, supra*.

We do not reach the question as to whether or not the F.E.A. should have been joined as a party to this action. But see *Associated Gen. Con. of A., Inc., Okl., etc. v. Laborers Int. U.*, 476 F.2d 1388, 1405-1407 (Em.App.1973) and *Air Products & Chemicals, Inc. v. United Gas Pipe Line Co.*, 503 F.2d 1060, 1062 (Em. App.1974).

This appeal is therefore, ordered dismissed and the case is remanded to the district court for proceedings not inconsistent with this decision.

Two (2) copies of Supplemental

Brief of dft.-appellant

Received January 29, 1976

Martin A. Berglas

COLE + DIETZ